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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

RICARDO LOPEZ-ELIAS, *Petitioner,*

versus

JANET RENO, ATTORNEY GENERAL, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the interpretation of 8 U.S.C. § 1252(a)(2)(C)—judicial review of orders of removal, orders against criminal aliens—by the Fifth Circuit Court of Appeals, which denied jurisdiction over petitioner's case, is in error and violates the due process of law clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner is Ricardo Lopez-Elias.

Respondent is Janet Reno, Attorney General.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit Opinion (Appendix A) is reported at *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000). The opinion of the Board of Immigration Appeals (Appendix B) is unpublished, *Lopez v. I.N.S.*, Docket Number 99-60134, date of decision 2/15/2000. The opinion of the Immigration Court is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 1, 2000 (Appendix A).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

The Fifth Amendment states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Fifth Circuit Court of Appeals denied jurisdiction to petitioner under 8 U.S.C. § 1252 (a)(2)(C) which states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final

> order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1227(a)(2)(A)(iii) applies in petitioner's case and states in pertinent part, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

Aggravated felony is defined at 8 U.S.C. § 1101(a)(43)(F) as:

> A crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.

A crime of violence is defined at 18 U.S.C. § 16 in the following manner:

> The term "crime of violence" means ---
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The term aggravated felony is defined at 8 U.S.C. § 1101(a)(43)(G) as:

> A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.

STATEMENT OF THE CASE

A. Proceedings Below

The United States Fifth Circuit Court of Appeals granted respondent's motion to dismiss Petition For Review For Lack of Jurisdiction in accordance with that court's interpretation of U.S.C. 8 § 1252(a)(2)(C).

Petitioner was charged on December 17, 1998 with

> Section 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)] of the Immigration and Nationality Act (ACT) . . . to wit: a crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense), for which a term of imprisonment imposed was one year or more.

On March 5, 1999, counsel for petitioner filed a "Motion For A More Definite Statement," requesting the INS to clarify which definition, (a) or (b) of the term "crime of violence," under Section 16 of Title 18, applied in petitioner's case.

On March 25, 1999, the INS changed the original charge to 8 U.S.C. § 1227(a)(2)(A)(iii) as defined in 8 U.S.C. § 1101(a)(43)(G).

On April 19, 1999, the Trial Judge decided that petitioner was deportable for a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) *for which petitioner was not charged* (Appendix C, page 18), and also stated that petitioner's offense could be viewed as a theft (for which petitioner was not convicted) as easily as a burglary under 8 U.S.C. § 1101(a)(43)(G) (*id.* at 18-19).

Petitioner appealed this decision to the Board of Immigration Appeals (BIA), and on October 4, 1999 the BIA dismissed the appeal, but stated that petitioner's deportability as an alien convicted of a crime of violence under section 101(a)(43)(F) (also referred to as section 8 U.S.C. § 1101(a)(43)(F)) was not properly before them because the INS amended the charge (Appendix B, page 13). However, the BIA determined that petitioner was deportable under 101(a)(43)(G) (also known as 8 U.S.C. § 1101(a)(43)(G)) which in pertinent part states that "the term aggravated felony means—a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." The BIA determined that petitioner did not commit a burglary, as burglary of a vehicle does not fall under the generic definition of burglary that applies if the statute does not define burglary (Appendix B, pages 13-14), but rather the petitioner was guilty of a "theft offense" and was therefore deportable on this basis (*id.* at 14-15).

The petitioner filed a Petition for Review with the Fifth Circuit Court of Appeals on November 3, 1999, arguing that he had not committed a "theft offense" and was therefore not guilty of an aggravated felony. The Fifth Circuit agreed with petitioner's argument that he had not committed theft. The court reasoned that he did not commit a "theft offense" because the charge that petitioner plead to stated only that he had committed burglary of a

vehicle with *intent* to commit theft. Petitioner's conviction did not require a finding that he had actually committed theft (Appendix A, pages 5-6).

The Fifth Circuit states that petitioner is not removable for committing a burglary or theft offense—for which he was removed (Appendix A, pages 5-6). In conclusion, however, the opinion states that their court does not have subject matter jurisdiction as set out under 8 U.S.C. § 1252(a)(2)(C) because petitioner *is removable* as an aggravated felon, which the Fifth Circuit Court decided he is according to their interpretation of 8 U.S.C. § 1101(a)(43)(F), a crime of violence, *he was not charged with at the trial level* (Appendix A, pages 7-8).

B. The Effect of the Fifth Circuit Court's Decision.

18 U.S.C. § 1252(a)(2)(C) states that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. The term "is removable" is latently ambiguous and the Fifth Circuit interpreted this to mean that they have no jurisdiction if petitioner *could have been removed* for any criminal offense listed under this statute, whether or not this was the offense petitioner was deported for (Appendix A, page 8). Their conclusion: "[w]hat the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason" (*id).*

In dicta, the Fifth Circuit states that petitioner is not removable for committing a burglary or theft offense—for which he was removed (Appendix A, page 5). The opinion finally determines, however, that their court does not have jurisdiction because petitioner is guilty of an aggravated

felony, a crime of violence, *he was not charged with* (Appendix A, page 2, and 5).

The effect of this opinion is to make a decision of the Immigration Courts non-reviewable if the deportee *could have been* deported for any criminal offense listed under 8 U.S.C. § 1252(a)(2)(C). This means that an appellate court may make a factual determination of the criminal offense based upon records gathered under *another* charge by the trial court.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court's interpretation of 8 U.S.C. § 1252(a)(2)(C) conflicts with well reasoned decisions from two other circuit court, conflicts with basic principles of statutory interpretation, and violates fundamental principles of due process under the Fifth Amendment to the United States Constitution.

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE SEVENTH CIRCUIT AND THE FIRST CIRCUIT COURTS

Federal circuit courts are not bound by the decisions of other circuits, but in the interest of uniformity should not usually reach a result in conflict with another circuit court, unless that decision is clearly erroneous.[1] The decision by the Fifth Circuit in *Lopez-Elias v. Reno* (Appendix A) conflicts with the prior decisions of the Seventh Circuit Court of Appeals and the First Circuit Court of Appeals.

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[1] *See generally* 21 C.J.S. *Courts* § 153, pages 189-190 (1990).

Xiong v. INS, 173 F.3d 601 (7th Cir. 1999), like petitioner's case involves the question of whether or not Xiong was an aggravated felon for purposes of deportation and for purposes of jurisdiction of the circuit court. The INS charged Xiong with a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) for the criminal offense of statutory rape. *Id.* at 603. Xiong contended that this offense did not constitute a "crime of violence" and thus he was not deportable as an aggravated felon. *Id.* at 604. The INS argued that even if statutory rape was not a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), the Circuit Court was without jurisdiction to determine the matter under 8 U.S.C. § 1252(a)(2)(C) because Xiong is an aggravated felon under 8 U.S.C. § 1101(a)(43)(A)—a statute Xiong had not been charged with for purposes of deportation. In *Xiong*, as in petitioner's case, both jurisdiction and the merits turn on whether Xiong has committed an aggravated felony. The Seventh Circuit determined that statutory rape was not a crime of violence as defined under 8 U.S.C. § 1101(a)(43)(F). *Id.* at 607. Furthermore, the Seventh Circuit determined that it did have jurisdiction because, the INS cannot substitute alternative grounds for deportation at the judicial review stage in the proceedings; to do so would violate the alien's due process rights under the Fifth Amendment. *Id.* at 608 (referring to *Choeum v. I.N.S.,* 129 F.3d 29 at 33).

In the First Circuit Court opinion in *Choeum v. Immigration and Naturalization Service*, 129 F.3d 29 (1st Cir. 1997) the court needed to decide whether or not it had jurisdiction over the case because the INS classified the petitioner as an "aggravated felon." The "aggravated felony" classification was assigned by the INS because they claimed Choeum had committed a firearms offense. This court determined it had jurisdiction because Choeum was charged with deportability based on a kidnapping offense,

not a firearms offense. *Id.* at 32-33. The court held that the "INS may not substitute alternative grounds for deportation at this stage in the proceedings, and that its argument fails both as a matter of statutory construction and because it raises due process concerns under the Constitution." *Id.* at 33.

The Ninth Circuit opinion, *Abdel-Razek*, 114 F.3d 831 (9th Cir. 1997), that the Fifth Circuit relies on for its persuasive authority can be easily distinguished from both *Xiong* and *Choeum*. In *Abdel-Razek*, the petitioner did not question whether he was an aggravated felon for being convicted of manslaughter for stabbing a man to death, nor did he contest his criminal conviction for manslaughter, his Petition for Review involved the prior court's decision denying the applicability of a waiver. His deportation proceedings were based on his manslaughter conviction. The INS did not try to introduce a new charge through denial of jurisdiction based on a different crime at the appellate stage. In addition, the Ninth Circuit did not discuss due process issues in conjunction with the denial of subject matter jurisdiction. The use of this case for persuasive authority is therefore highly tenuous.

II.

THE FIFTH CIRCUIT'S OPINION IS CONTRARY TO BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

Statutory interpretation involves a reasoned search for the intention of the legislature. The intention of the legislature is to be determined primarily from the language used in the statute, considering the entire language of the statute in its plain, ordinary, and popular sense. The court

may also consider the particular language employed in the context of the whole statutory scheme.[2]

The Fifth Circuit purports that the word "removable" means "could be removed" (Appendix A, page 8a). However, 8 U.S.C. § 1252(a)(2)(C) comes from a statutory section concerned with final orders of deportation. By its terms this section only applies to aliens who have actually been adjudged deportable. Therefore it is highly unlikely, in this context, that Congress meant "removable" to be defined as "potentially susceptible of being removable."[3]

Furthermore, there are certain presumptions of statutory interpretation which are that Congress intended for a statute to accomplish a just and rational result and that Congress acted with full knowledge of the constitutional scope of its powers.[4] In addition, within the rules of statutory construction there is a well established principle that statutes are to be interpreted to avoid constitutional difficulties. *Frisby v. Schultz*, 487 U.S. 474, 483 (1987). The Fifth Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(C) cuts off judicial review based on an uncharged ground and thus allows the petitioner to be deported for an uncharged offense. This interpretation conflicts with petitioner's procedural due process rights as conferred under the Fifth Amendment to the United States Constitution, such as notice of the nature of the charges and a meaningful opportunity to be heard. The Fifth Circuit is relying on facts in the record developed under another charge without giving petitioner an opportunity to be fully heard on this issue.

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[2] *See* 82 C.J.S. *Statutes* § 315, pages 406-407 (1999).

[3] *For similar argument see Choeum v. I.N.S.* at 38-39.

[4] *See* 82 C.J.S. *Statutes* § 310, pages 394-395 (1999).

III.

THE FIFTH CIRCUIT'S OPINION DENIES PETITIONER DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT

The Fifth Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(C) cuts off judicial review based on an uncharged ground and thus allows the petitioner to be deported for an uncharged offense. To allow this interpretation in effect permits the INS to substitute alternative grounds for deportation after the trial adjudication, thus disallowing a fully informed response from petitioner. The INS had its opportunity to change the charge at the hearing stage. INS regulations permit the INS to lodge additional charges of deportability "at any time during a hearing" before an Immigration Judge, but these charges must first be submitted in writing for service on the alien and for entry into the record, that the Immigration Judge shall read the additional charges to the alien and explain them to her, and that the alien may have a reasonable time, including requesting a continuance, to respond to the additional charges. 8 C.F.R. § 242.16(d).

The power of Congress to regulate aliens is not completely unlimited. Resident aliens, such as petitioner, are "persons" for purposes of the Fifth Amendment's due process of law clause. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). In addition, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

IV.

PETITIONER HAS NOT COMMITTED AN AGGRAVATED FELONY FOR PURPOSES OF DEPORTATION NOR FOR THE PURPOSE OF DENIAL OF JURISDICTION

Petitioner has not committed a burglary or a theft offense as defined under the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(G), "[a] theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

A. Petitioner is not an aggravated felon for committing a "burglary" offense.

Petitioner does not contest that on July 11, 1985 he was convicted in the 291st Judicial District Court of Dallas County, Texas for the offense of burglary of a vehicle, in violation of Texas Penal Code § 30.04. However, petitioner contends that burglary of a vehicle is not considered a "burglary" for deportation purposes.

Under the United States Supreme Court Case, *Taylor v. U.S.*, 495 U.S. 575 (1990), the Court held that where the definition of burglary is not given within the federal statute, a generic definition is to apply which would include the basic elements of "unlawful or unprivileged entry into, or remaining in a building or structure with intent to commit a crime." *Id.* at 598-99. The Court created this generic definition (based on the Model Penal Code) because absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be

impaired if state law were to control." *Id.* at 591. *United States v. Turley*, 352 U.S. 407 (1957), quoted by *Taylor*, instructs that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *Id.* at 411. In the *Taylor* case the Court noted that because states may name a crime involving the elements of burglary something other than burglary, and a crime not involving the elements of burglary as burglary, using the state classification would be confusing and also an unjust application of the Enhancement Provision 18 U.S.C. § 924(e) of the Federal Sentencing Guidelines. *Id.* at 599-600. Therefore, a generic definition of "burglary" was called for. *Id.* at 602. Throughout this opinion the Court refused to hold that "burglary of a vehicle" fit the generic definition of burglary. The Court uses "burglary of a vehicle" to show how over-broadly some states define burglary and to show how unfair it would be to use burglary as an enhancement factor when some states, such as Michigan, formally name no offense burglary, and that some states, such as California, "define burglary so broadly as to include shoplifting and theft of goods from a "locked but unoccupied automobile." *Id.* at 591. Note, for example, that the Texas Statute for Burglary of a Vehicle does not require the car to be locked, and that Burglary of a Vehicle would occur if the defendant merely reached into the back of a pickup and removed property, not his, without the consent of the owner.[5]

Under 8 U.S.C. § 1101(a)(43)(G) no definition for burglary is given, therefore a federally generic definition of burglary should apply and this definition, as developed in *Taylor*, does not include burglary of a vehicle. Accordingly,

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[5] *See* Tex.Pen.Code § 30.04 (Vernon's 1998) *and Hopkins v. State*, 864 S.W.2d 119 (Tex.App.—Houston [14th Dist.] 1993, pet. ref'd.) (taking ladder out of open bed of truck constitutes "entry").

under the generic definition of burglary, petitioner is not an aggravated felon.

B. Petitioner is not an aggravated felon for committing a theft offense.

Petitioner plead guilty in 1985 to Burglary of a Vehicle, he did not plead guilty to theft. Petitioner may not be deported for a crime not charged with nor convicted for as the elements of Burglary of a Vehicle do not support a conviction for theft. A conviction for theft requires proof of the type of property taken and the value of the property. The value of the property is important because it determines the sentence of the offender. If, for example, the value is under $500. it is a class B misdemeanor and the maximum sentence is six months,[6] which would disqualify the offense as an aggravated felony due to the sentence being under one year. "[T]he immigration judge must look to judicial records to determine whether an alien has been convicted of a crime, and he may not determine on his own the alien's guilt or innocence." *Matter of Roberts*, 10 I&N Dec. 194 (BIA 1991) citing *Matter of Contreras*, 18 I&N Dec. 30 (BIA 1981). Further, "[w]hile inquiry may be had into the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted, it is impermissible to go behind a record of conviction to reassess an alien's ultimate guilt or innocence." *Matter of Roberts*, supra citing *Matter of M-*, 3 I&N Dec. 804, 805 (BIA 1949). The Court in *Taylor v. U.S.*, 495 U.S. at 602 instructs that in finding whether or not the defendant was convicted of the generic definition of burglary (for example), a categorical approach should be used. The rule is that the government can look only to the

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[6] *See generally* Texas Penal Code Chapter 31, Theft, and Chapter 12, Punishments.

fact of conviction and the statutory definition of the prior offense.

C. Petitioner should not be classified as an aggravated felon Under 8 U.S.C. § 1101(a)(43)(F) because petitioner was not charged by the INS under this statute and burglary of a vehicle is now classified under the Texas Penal Code as a misdemeanor.

To classify petitioner as an aggravated felon under 8 U.S.C. § 1101(a)(43)(F) violates the procedural due process guaranteed under the Fifth Amendment (as discussed in section III of this petition) because he was not ultimately charged with this deportation offense.

To classify petitioner as an aggravated felon under this portion of § 1101 also violates petitioner's substantive due process rights under the Fifth Amendment. Under Texas law burglary of a vehicle is now (as of 1993) a Class A misdemeanor. Tx.Penal § 30.04 (Vernon's 1998). 8 U.S.C. § 1101(a)(43)(F) requires that to be a "crime of violence," as defined in 18 U.S.C. § 16, the offense must have a sentence of "*at least* one year." Under 18 U.S.C. § 16(b) crime of violence is defined as "any other offense that *is* a felony." Petitioner suggests "is" is to be given its plain meaning of the present tense. Burglary of a vehicle has been classified under Texas law as a Class A misdemeanor since 1993, *id.*, this class of offense requires a sentence of one year *or less,* this meaning is not the same as the statute requires: *"at least one year"*, (which in its plain sense means an offense sentence of one year or more*)*.

There are several compelling reasons to interpret the statute as petitioner suggests. Foremost is legislative intent as to the meaning of "one year or more" and "is" rather than

"was" a felony. Under the daily edition of the Congressional Record, the major drafter of the bill, Senator Abraham, states in reference to the problem of criminal aliens who are deportable and should be deported, "These are not suspected criminals: These are convicted felons."[7] He doesn't say "these are convicted misdemeanants!" The implication is he did not intend deportation for misdemeanors or crimes classified under the category of a sentence of 1 year or less.

In addition, if the meaning is interpreted to be "was a felony" instead of "is a felony" the result would be that some aliens would be deported for burglary of a vehicle as a felony while others would not be deported for the exact same offense committed at a later date. If their offense occurred after 1993 it would be classified as a Class A Misdemeanor with a sentence of 1 year or less. If the offense occurred before 1993 it would be classified as a felony with a sentence of one year or more. This application applies a present regulation unfairly based on the date of the past offense *not on the culpability of the alien.* This would not be a rational application of a statute, but would deprive aliens of their liberty in an arbitrary and capricious manner without sufficient justification for such a result.[8] In addition, when a statute is ambiguous in its meaning the principles of statutory constructions require

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[7] *See* 142 Cong. Rec. S4598 (May 2, 1996).

[8] *See Pension Benefit Guar. Corp v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) ("[A]lthough we have noted that retrospective civil legislation may offend due process if it is 'particularly "harsh and oppressive,'" that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in Turner Elkhorn.") (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938).

that it be applied in its most beneficial or least harmful manner to those who fall within its application.

While Congress has plenary power to enact immigration legislation, that power does not override the Court's mandate to see that Congress uses "constitutionally permissible means." *INS v. Chadha*, 462 U.S. 919, 940-41 (1983). In addition, *Reno v. Flores*, 507 U.S. 292, 306 (1993) mandates that INS regulation must *rationally* advance some legitimate governmental purpose.

The severity of the consequences of deportation to petitioner's liberty interest, especially because the criminal conviction occurred long ago, and the petitioner has an interest in repose, requires a close review of the arbitrary nature of the classification of aggravated felon by the INS, especially since the offense is currently classified as a misdemeanor by state law. The application of this statute should pass a basic rationality analysis which requires corresponding governmental interests be advanced to justify the retroactive attack on the petitioner's liberty interest.

Finally, if this provision applies to petitioner retroactively, then in fairness, the 1993 statute, amending burglary of a vehicle to a misdemeanor should also apply retroactively; it should be error to do otherwise. In its opinion denying jurisdiction because the petitioner is an aggravated felon for a crime of violence, the Fifth Circuit has in effect cut through the fabric of time, applying a 1996 immigration law to a 1985 offense while keeping the burglary of a vehicle offense as a felony when it is actually now as misdemeanor. Petitioner questions the fairness of applying a law that harms him retroactively while disallowing a criminal law to help him retroactively, especially when doing so would ensure more equal treatment to all those convicted of burglary of a vehicle.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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